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February 12, 1987

The Honorable Jim Skelly  
Arizona State Representative  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I87-027 (R86-074)

Dear Representative Skelly:

You have asked for our opinion whether the United States Constitution prohibits high school students from including an invocation in their commencement exercises. We conclude that there is no controlling authority on this precise question in this jurisdiction and that conflicting authority exists elsewhere. Thus, we find no clear prohibition against this custom.

The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This amendment primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697, 701 (1970); Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985).

Parallel provisions exist in the Arizona Constitution. Art. II, § 12 provides, in pertinent part, as follows:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Ariz. Const., art. IX, § 10 provides:

No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

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The Arizona Supreme Court has interpreted art. II, § 12 as follows:

We believe that the framers of the Arizona Constitution intended by this section to prohibit the use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion.

Pratt v. Arizona Board of Regents, 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974).

Neither the United States Supreme Court nor the Arizona courts have directly dealt with the issue of prayer at graduation ceremonies or school sponsored events. However, the Ninth Circuit Court of Appeals considered the permissibility of student-conducted prayers at public school assemblies in Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U.S. 863. Collins, a parent of two children then enrolled in Chandler High School, sought to stop the school from allowing student council members to include prayers in the program of school assemblies. Students had the option of attending the assemblies or spending the time in study halls. Student leaders decided whether to include a student-read prayer in the program.

The court said the fact that the assemblies were voluntary did not save the practice from constitutional attack. Collins, 644 F.2d at 761. Previous case law failed to make a "meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting students to direct the exercises'". Id.

The court applied the three-step test promulgated by the United States Supreme Court to determine whether government's involvement with religion is impermissible. The test is:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

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Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971) (citations omitted).

Under the Lemon v. Kurtzman test, Chandler High School's practice was constitutionally impermissible. First, the Court said the invocation served no apparent secular purpose and Chandler officials offered none. 644 F.2d at 762. Second, the prayer appeared to advance religion "in the institutional coercive setting of primary and secondary schools." Id. The court went on to say:

[T]he activity in our case goes beyond symbolic inference. The Chandler students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs.

Id. Finally, the court said that the practice entangled the government in religion because school assemblies required surveillance by school officials and probably required attendance by faculty and staff. Id.

Also, in Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (S.D. Iowa 1985), the district court found that offering invocations and benedictions at graduation ceremonies would violate the first and second prongs of the Lemon test because the purpose of offering these prayers is "solely religious" and would have the primary effect of advancing the Christian religion. Id. at 533, 535-536. In that case, three expert witnesses and the minister who would be giving the invocation and benediction testified that a religious purpose, and not a secular purpose, would be served.

On the other hand, district courts in other circuits have arrived at contrary results. For example, in Stein v. Plainwell Community Schools, 610 F.Supp. 43 (W.D. Mich. 1985), the court denied the plaintiff's request for a preliminary injunction to stop the invocation and benediction planned to be included in a high school graduation ceremony.

The Stein court noted three valid secular purposes for including a short prayer in the graduation ceremony. 610 F.Supp. at 48. First, the high school had a long tradition of including a short prayer in its ceremonies. Id. The court said some form of solemn opening and closing of the ceremonies is needed and the fact that the form chosen is from the Christian tradition is not dispositive of religious intent alone. Id. Second, graduating seniors are permitted to participate in and conduct their ceremonies as they see fit without interferences from the school district. Id. Finally, no evidence showed that the school district had a secret purpose to persuade the audience to accept a particular religious belief. Id.

Under the second prong of the Lemon test, the court relied on six factors to conclude that the primary effect of the invocation and benediction was not the advancement of religion. First, the graduation ceremony was voluntary and not a mandatory part of the school curriculum. 610 F.Supp. at 49. Second, the school had no control over what the speakers, who were not school employees, would say. Id. Third, the prayers were given once a year, each time to a different audience, so there was no danger of daily indoctrination. Id. Fourth, the make-up of the audience lessened the possibility that any part of the ceremony could have the effect of advancing religion. Id. Most of the audience would be made up of parents and graduating seniors beyond the age of being readily impressionable. Id. Fifth, the purpose of the ceremony was not educational but ceremonial; the audience did not attend expecting to receive religion instruction. Id. Finally, the speakers did not intend to use the invocation and benediction as an opportunity to proselytize. Id. at 50.

In applying the third prong of the Lemon test, the court concluded that short prayers at graduation ceremonies do not foster excessive government entanglement with religion. The court reasoned:

A once-a-year ceremony requiring minimal relations between school officials and local clergy does not present the kind of entanglement prospects that the courts have found violative of the establishment clause.

Id. at 50.

The court in Grossberg v. Deusebio, 380 F.Supp. 285 (E.D. Va. 1974) also indicated it would not find that

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invocations and benedictions at a public high school commencement violated the Establishment Clause. The court explained:

There is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination. The overall program of which the invocation will be a part is neither educational nor religious, but ceremonial, and the total length of the invocation has been estimated as only a few minutes. Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again . . . . Government here is not "embroiled" in religious matters.

Grossberg, 380 F.Supp. at 288-89. The court added:

We must bear in mind that the primary purpose of the occasion is ceremonial. It is a ceremony geared primarily to the award of honors and diplomas.

380 F.Supp. at 289. And further:

Any attempt to impose rigid limits upon the mention of a deity or references to religious principles would be fraught with dangers.

Id. See also Wood v. Mt. Lebanon Township School District, 342 F.Supp. 1293 (W.D. Pa. 1972), and Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974), cert. denied, 419 U.S. 967.

The United States Supreme Court has recently spoken on the issue of prayer in schools, but in the context of an Alabama statute that authorized a daily period of silence in public schools for meditation or voluntary prayer. In Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) the court struck a state statute as violating the First Amendment of the United States Constitution because the legislation enacted was intended to convey a message of state approval of prayer in public schools. 472 U.S. at 61, 105 S.Ct. at 2493, 86 L.Ed.2d at 45. The legislator sponsoring the

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bill stated specifically that it was intended to return prayer to public schools. 472 U.S. at 57-60, 105 S.Ct. at 2490-2492, 86 L.Ed.2d at 43-46.<sup>1/</sup>

We note that the United States Supreme Court has upheld the Nebraska legislature's long-standing practice of opening legislative sessions with prayer by a chaplain paid with public funds. Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). The Court stated:

Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.

463 U.S. at 789, 103 S.Ct. at 3334, 77 L.Ed.2d at 1025. The Court went on to state:

To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.

463 U.S. at 792, 103 S.Ct. at 3336, 77 L.Ed.2d at 1028.

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<sup>1/</sup>On January 27, 1987, the United States Supreme Court also granted certiorari in Karcher v. May, Docket No. 85-1551, to review May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985) in which the Third Circuit declared a New Jersey statute unconstitutional. N.J.S.A. 18A:36-4 provided:

Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

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At some point in the future, the United States Supreme Court may consider the question you have asked us and determine whether school commencement exercises are more analogous to the ceremonial opening of legislative sessions or, instead, to daily prayer in public primary and secondary classrooms. At the present, however, we find no controlling authority on the precise question you have asked us.

Thus, we find that the offering of prayers by Arizona students at their high school graduation ceremony is neither explicitly authorized nor prohibited by the prevailing case law.

Sincerely,



BOB CORBIN  
Attorney General

BC:PAS:JGF:gm